Darst v. Bates, 51 Ill. 439; and other authorities collected in note to *Blanchard v. Tyler*, (Mich.), 86 Am. Dec. 63. There are a few cases *contra: Loomis v. Pingree*, 43 Me. 299; *Fontaine v. Boatmen's Sav. Bank*, 57 Mo. 552, 561; *Henderson v. Mayor etc. of Baltimore*, 8 Md. 352; *Eaton v. Trowbridge*, 38 Mich. 454, *per* Cooley, J. The subject will be found discussed at some length in 1 Devlin on Deeds, secs. 178-182. Mr. Devlin gives each side of the controversy a hearing, and expresses his own conclusion as coinciding with that of the majority.

THE STATUS IN VIRGINIA OF THE RULE AGAINST DUPLICITY.—By the statute of 4 Anne, c. 16, sec 4 (1705), it was enacted: "That it shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto as he shall think necessary for his defence." For the construction of this statute, see 1 Chitty Pl. 540; Stephen Pl. (Tyler's ed.) 262-267.

In Virginia, by an act passed in May, 1732 (4 Hen. Stat. p. 324), it was declared that "the plaintiff in replevin or the defendant in any other action, may, with the leave of the court, plead as many several matters as he shall think necessary for his defence, so as they be not permitted to plead and demur to the whole." But in October, 1777 (9 Hen. Stat. 409), the statute was changed so as to read as follows: "The plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, *whether of law or fact*, as he shall think necessary for his defence;" thus dispensing with the leave of the court, and permitting the defendant to both plead and demur. By the Code of 1887, sec. 3264, it is enacted: "The defendant in any action may plead as many several matters, whether of law or fact, as he may think necessary; and he may file pleas in bar at the same time with pleas in abatement, or within a reasonable time thereafter; but the issues on the pleas in abatement shall be tried first."

The Virginia statute, in its present form, differs from the statute of Anne in three particulers: (1) No leave of court is required; (2) It extends to pleas in abatement as well as to pleas in bar, and several dilatory pleas may be pleaded at the same time, and dilatory and peremptory pleas together; and (3) It permits the defendant to both demur and plead to the declaration, for he may plead "as many several matters, whether of *law* [demurrer] or *fact* [plea], as he shall think necessary."

But, like the English statute, sec. 3264 refers only to the *defendant's* answer to the *declaration* (replevin in England being an apparent but not real exception, the defendant's *avowry* being in the nature of a *declaration*), and does not extend to the plaintiff's replication to the defendant's pleas, or to the subsequent pleadings. The rule against duplicity continued in full force in England after the statute, *except as to the defendant's answer to the declaration.* And the law of Virginia was the same until the revision of 1849 (taking effect July 1, 1850), when special demurrers for formal defects were *abolished* by the statute declaring that "on a demurrer (unless it be to a plea in abatement) the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading, or insufficient pleading or not, unless there be omitted something so essential to the action or defence that judgment according to law and the very right of the cause cannot be given." Code of Virginia, sec. 3272. Now it

is settled law that the fault of duplicity is formal only, and cannot be taken advantage of by general demurrer (see Gould Pl. 406; 1 Chitty Pl. 513; 5 Rob. Prac. 305; *Cunningham v. Smith*, 10 Gratt. 255); and the question arises *whether the objection of duplicity can now in Virginia be made effectual in any way*, since the former method by special demurrer has ceased to be applicable. Suppose, for example, the defendant unites *in one plea* several separate matters of defence (which union is not authorized by either the English or Virginia statute), or that the plaintiff combines several separate demands in *one count* of the declaration, or *replies* several matters to each plea of the defendant (see Stephen, p. 265-6)—what can be done about it? It has been held, as duplicity in pleading *can only be taken advantage of by a special demurrer*, that in those jurisdictions where special demurrers are abolished, this objection cannot now be maintained. See Gould Pl. p. 516, note, citing *King v. Howard*, 1 Cush. (Mass.) 137. And there is authority for this view both in Virginia and West Virginia. In *Grayson v. Buchanan*, 88 Va. 251, it is said that an objection to a plea on the ground of duplicity can be taken at common law by special demurrer *only*, which is not now available in Virginia except as to dilatory pleas; citing 4 Min. Inst. 939, where the law is so laid down. And in *Coyle v. R. Co.*, 11 W. Va. 94, 107, and *Sweeny v. Baker*, 13 Id. 158, 201, it is held that duplicity in a declaration is an error of form only, and that a demurrer to a count in a declaration by reason of duplicity ought not to be sustained, as special demurrers except as to pleas in abatement are abolished; and it is intimated that there is *no way* in which the objection of duplicity can be maintained. But, on the other hand, in *Harris v. Harris*, 23 Gratt. 737, 750, it was held that the court below was justified in *rejecting* a plea which presented several distinct issues of fact; and in *Little Kanawha etc. Co. v. Rice*, 9 W. Va. 636, it was decided that a special plea was properly *rejected* because it was double. In *O'Bannon v. Saunders*, 24 Gratt. 138, it is said that "while the defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary, yet he must plead them *in several pleas*, and not all, or more than one, in one plea, unless the several matters so pleaded in one plea be *constituent parts of one and the same defence*. Duplicity to that extent must still be avoided by the defendant in an action." And in *Va. Fire etc. Co. v. Saunders*, 86 Va. 969, the objection to a replication that it was *bad for duplicity* was disallowed on the ground that no matters, however multifarious, will operate to make a pleading double that together constitute but one connected proposition or entire point (see Stephen Pl. p. 250), thus implying that *if there had been duplicity* the objection would have been sustained.

As the authorities now stand, it is impossible to say whether duplicity in a declaration or plea can be made a ground of objection in Virginia. It seems settled that it cannot be done by *demurrer* (the case of *Cunningham v. Smith*, 10 Gratt. 255, was no doubt decided under the law as it existed prior to July 1, 1850); but it does not follow that the objection is *in no way* available. It is probable that in Virginia a plea bad for duplicity might, on motion, be rejected; or, if already received, be ordered to be stricken out—a procedure common in Virginia with reference to defective pleas. And, perhaps, the same course would be pursued as to a count in a declaration bad for duplicity. See 5 Rob. Prac. 305.

In the foregoing cases the pleader might have avoided the fault of duplicity

(if *fault* it now is) by the use of *several distinct pleas*, or several *counts*. But suppose the plaintiff replies several distinct matters to a single plea of the defendant, which he was forbidden to do by the common law, and which is not permitted by either the statute of Anne or the Virginia statute: does the Virginia statute abolishing special demurrers leave the defendant without remedy? It is said in 4 Min. Inst. 952, that to the replication the rule against duplicity is still as applicable as it was at common law, and that the plaintiff can give but one answer, either of law or fact, to each plea. And it is believed that the proper mode of objecting to several replications to the same plea would be by motion to strike out all but one, allowing the plaintiff to select the one to be retained; or else by objecting to the replications when offered, and putting the plaintiff to his election as to the one to be relied on. But no decision has been found on this point.

It may well be doubted, however, whether it is right to confine the plaintiff to a single reply to each plea. If the defendant, for example, in an action of assumpsit for goods sold and delivered, pleads *infancy*, and the plaintiff wishes to reply, (1) that the defendant was *not* an infant when he bought the goods; (2) that if he was, the goods were *necessaries;* and, (3) that, if they were not necessaries, the defendant, after full age *promised in writing to pay for them*, no sufficient reason is perceived why he should not be allowed to do so. And in West Virginia the statute now declares (ch. 125, sec. 20): "To any special plea pleaded by a defendant, the plaintiff may plead as many special replications as he may deem necessary." The West Virginia statute also provides that if the defendant "plead the plea of *non est factum*, he shall not, without leave of the court, be permitted to plead any other plea inconsistent therewith."